Office of Special Counsel and Whistleblower Protection Primer

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PREFACE

Few areas of Federal employment law have mushroomed as much as has the area of whistleblower protection. Developments within the last few years, beginning with the passage of the Whistleblower Protection Act of 1989, have led to a virtual explosion of litigation. While the Merit Systems Protection Board has attempted to narrow the scope of the law, Congress has stepped in to legislatively expand employee rights.

In addressing the broad topic of whistleblower protection, this primer is divided into four parts. In Part One, we provide the historical background for and an overview of whistleblower protection in the Federal sector. In Part Two, we discuss the Office of Special Counsel and the installation's obligations when the Office of Special Counsel conducts an investigation. In Part Three, we provide a detailed legal analysis of how to defend an individual right of action appeal under the Whistleblower Protection Act. Finally, in Part Four, we look at procedures before the Department of Labor and those claims of whistleblower retaliation which it can review.

PART ONE - INTRODUCTION

The impetus for protecting Federal employees who “blow the whistle” on fraud, waste, and abuse was primarily provided by the case of A. Ernest Fitzgerald. Mr. Fitzgerald was appointed to the position of Deputy for Management Systems in the Office of the Secretary of the Air Force in September of 1965. He was an outspoken critic of the program to build the C-5A military transport aircraft and, in October of 1968, he was invited to testify before the Senate's Joint Economic Committee, chaired by Senator William Proxmire who opposed further funding of the C-5A.

At first, the Air Force attempted to prevent Mr. Fitzgerald from testifying. Eventually, he was permitted to testify but was cautioned by his superiors to avoid testifying

about the C-5A. At the hearing, in response to a direct question from Senator Proxmire, Mr. Fitzgerald stated that the C-5A contract might run some $2 billion more than originally estimated.

In June of 1969, Mr. Fitzgerald appeared before the Joint Economic Committee to testify about another procurement program. Again, his superiors in the Air Force attempted, unsuccessfully, to prevent him from testifying.

On November 4, 1969, Mr. Fitzgerald was told that his position had been eliminated as part of a reorganization and reduction in force. He appealed this decision to the Civil Service Commission. In September of 1973, the Civil Service Commission recommended that Mr. Fitzgerald be reinstated. It also ruled that the evidence did not prove that Mr. Fitzgerald had been removed in retaliation for his testimony before Congress, despite a January 6, 1969, Air Force memo which outlined three ways in which he could be removed, including a reduction in force. On June 15, 1982, the Air Force agreed to reassign Mr. Fitzgerald to his former position.

Part of the fallout from the Fitzgerald case was the enactment of whistleblower protection legislation as part of the Civil Service Reform Act of 1978 ("CSRA"). Together with Reorganization Plan No. 2, the CSRA completely reorganized the Federal civil service. The Civil Service Commission was abolished and its personnel management functions were transferred to a newly created Office of Personnel Management ("OPM"). The CSRA also created a new, independent Federal agency—the Merit Systems Protection Board ("MSPB"). Responsibility for hearing and deciding employee appeals of certain personnel actions was transferred from the old Civil Service Commission to the MSPB. Finally, an independent Office of Special Counsel ("OSC") was created within the MSPB and given the responsibility for investigating allegations of retaliation against whistleblowers. The OSC was given the authority to prosecute allegations of retaliation before the MSPB and to seek corrective action against Federal agencies and disciplinary action against responsible civilian employees. As originally enacted, a decision by the OSC whether or not to prosecute a particular case was not subject to review and employees could not bring actions on their own behalf.

In 1989, the CSRA was amended by the Whistleblower Protection Act of 1989 ("WPA"). The WPA took the OSC out from under the MSPB and made it an independent Federal agency. It allowed individuals to pursue actions on their own behalf before the MSPB if they were dissatisfied with the OSC's decision not to bring an action or if the OSC failed to act within specific timelines. It also changed the standards of proof in whistleblower retaliation cases to make it easier for the OSC or an employee to establish a case of reprisal.

Finally, in 1994, Congress enacted the Office of Special Counsel Reauthorization Act ("OSCRA"). The OSCRA expanded the definition of individuals protected against retaliation to include employees and applicants for employment in Amtrak, the Federal Deposit Insurance Corporation, the Tennessee Valley Authority, and the Resolution Trust Corporation. It added to the list of prohibited personnel actions that were covered. And, it once more changed the standards of proof in favor of those claiming retaliation.

In Part Two, we will look at the structure and authority of the OSC. We will also look at an installation's obligations during an OSC investigation. In Part Three, we will look at the elements of a whistleblower reprisal case and how to defend an individual right of action appeal.

However, Air Force attorneys should be aware that Congress has not been content to rely solely upon the provisions of the CSRA, WPA, and OSCRA to protect individuals against retaliation for whistleblowing activities. There are a number of statutes which protect Federal employees and other individuals against reprisal in specific situations. Some of these statutes have their own enforcement provisions. Many provide for an investigation by the Department of Labor and a decision on the allegations of retaliation by the Secretary of Labor. In some instances, they may provide for a hearing before a Department of Labor Administrative Law Judge. Remedies may include reinstatement, back pay, attorneys fees, compensatory damages, and, in some cases, exemplary damages. In Part Four, we will examine these statutes and the procedures used by the Department of Labor to hear and decide cases.

PART TWO - THE OFFICE OF SPECIAL COUNSEL

For those who have never dealt with the OSC, the first experience can be quite disconcerting. The first contact is likely to be a telephone call from an OSC investigator, informing the base that he or she will be coming to investigate allegations that the base has committed a prohibited personnel practice. In some circumstances, the investigator may be prohibited from revealing the nature of the investigation and the identity of the individual who has made the allegations. If the OSC has received evidence that it believes warrants immediate action, it may request that the Air Force agree to stay an action that has been proposed or taken. If the Air Force does not agree, the OSC has the authority to seek an *ex parte* stay order from the MSPB.

Supervisors, managers and commander can be, quite naturally, very defensive when the OSC conducts an investigation. OSC investigations are disruptive and they can interfere with management's right to direct and discipline the civilian workforce, particularly if a stay is imposed. It is imperative to bear in mind that **Federal agencies and their employees are required to cooperate in OSC investigations**. As a general rule, civilian employees cannot refuse to answer questions and only the Secretary of the Air Force can refuse to provide documents. Base legal offices must be prepared to deal with the exasperation that management officials feel and ensure cooperation with the OSC.

It is important in any OSC investigation to understand who the key players are, what the OSC's responsibilities are, and what are the possible outcomes of an OSC investigation. During an OSC investigation, it must be borne in mind that the cardinal rule is that all Air Force personnel are required to cooperate with an OSC investigation.

A. KEY AIR FORCE PLAYERS

Within the Air Force, there are three offices that play a key role in OSC investigations. These are the Office of the General Counsel (SAF/GC), the Central Labor Law Office (CLLO), and the base Staff Judge Advocate (SJA).

SAF/GC is the office of primary responsibility for all OSC cases. It advises the Secretary of the Air Force on what, if any, action is to be taken as a result of an OSC investigation.

The CLLO acts as liaison between the OSC and the Air Force. If the OSC undertakes to prosecute a corrective action against the Air Force before the MSPB, the CLLO is responsible for representing the Air Force. In many cases, the CLLO is able to informally

resolve questions or problems that arise during the course of an OSC investigation.

The base SJA is responsible for appointing a local attorney to act as liaison with the OSC investigator. The local liaison attorney ensures that witnesses are available for interviews and that the investigator receives copies of all requested documents that are not privileged.

B. STRUCTURE OF THE OSC

1. The Special Counsel

The OSC is headed by the Special Counsel, who is appointed by the President, by and with the advice and consent of the Senate. The Special Counsel serves a five year term of office and can be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. 5 U.S.C. § 1211(b).

2. Offices of the OSC

The OSC headquarters is located at 1730 M Street, N.W., Washington, D.C. 20036-4505. Unlike the MSPB, where appeals are filed with the appropriate regional office for processing, all complaints falling within the OSC's jurisdiction are filed with its headquarters. The complaints are reviewed by the Complaints Examining Unit, which determines which matters warrant further investigation. The Complaints Examining Unit then refers those cases to the Investigation Unit. If the OSC decides to bring a case before the MSPB, it is handled by the OSC's Prosecution Division.

3. Field Offices

In addition to its headquarters, the OSC has two field offices located in Dallas and San Francisco. These offices are responsible for investigating and prosecuting cases referred to them by the Complaints Examining Unit.

C. OSC RESPONSIBILITIES

The duties of the OSC include (1) protecting employees, former employees, and applicants for employment from prohibited personnel practices; (2) receiving and investigating allegations of prohibited personnel practices and, where appropriate, bringing petitions for stays, petitions for corrective action, and complaints for disciplinary action; (3) receiving, reviewing and, where appropriate, forwarding disclosures of violations of law, rule or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety to the Attorney General or an agency head; (4) reviewing regulations issued by the Office of Personnel Management and, where those regulations would require the commission of a prohibited personnel practice, filing complaints with the MSPB; and (5) conducting investigations of Hatch Act violations, arbitrary or capricious withholding of information under the Freedom of Information Act, or activities prohibited by any civil service law, rule, or regulation. 5 U.S.C. §§ 1212, 1216. It has jurisdiction over claims of violations of the Hatch Act by Federal and state employees and allegations that agencies have committed, or are threatening to commit, prohibited personnel practices. The OSC also receives, reviews, and forwards, where appropriate, whistleblower

disclosures to the Attorney General or to agency heads for action.

In carrying out its duties, the OSC performs two primary functions. First, it investigates allegations within its jurisdiction to determine whether or not an administrative action is warranted. Second, where it has determined that action is warranted, it prosecutes those actions before the MSPB.

With the exception of certain cases brought to its attention under the Whistleblower Protection Act of 1989 (see Part Three, below) and veterans reemployment cases under 38 U.S.C. § 4325, the OSC has the final say on whether or not an action is brought. Its determination that an action is not warranted is subject, at most, to judicial scrutiny to ensure compliance with the statutory requirement that it perform an adequate inquiry. *See Carducci v. Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983); *Cutts v. Fowler*, 692 F.2d 138, 140 (D.C. Cir. 1982); *Wren v. Merit Systems Protection Board*, 681 F.2d 867 (D.C. Cir. 1982).

1. Hatch Act Cases

The OSC is responsible for investigating and prosecuting claims of violations of the Hatch Political Activities Act ("Hatch Act") by Federal and certain state employees. 5 U.S.C. § 1216(a)(1) and (2). Provisions of the Hatch Act relating to activities of state employees are found at 5 U.S.C., Chapter 15. Provisions relating to Federal employees are at 5 U.S.C., Chapter 73, Subchapter III. The Office of Personnel Management has issued regulations regarding political activities by Federal employees, which can be found at 5 C.F.R., Part 733.

With few exceptions, the Hatch Act covers all competitive and excepted service employees in the Executive Branch of the Federal government. It also covers employees of the United States Postal Service and the District of Columbia. It covers full time, part time, and temporary employees. However, intermittent employees and occasional employees are covered only during the 24-hour period of any day in which they are actually employees. In addition, all covered employees are subject to the Hatch Act while on annual leave, sick leave, leave without pay, administrative leave, or furlough. *See Special Counsel v. Biller*, 32 M.S.P.R. 110, 111 (1987); *Special Counsel v. Daniel*, 15 M.S.P.R. 636, 638 (1983); *In re Montgomery*, 3 P.A.R. 45, 48 (1970).

In 1993, the Hatch Act was amended to permit Federal employees greater freedom to participate in political activities. In general, covered employees may take an active part in political management or in political campaigns. Federal employees are **permitted** to:

(1) be candidates for public office in nonpartisan elections;
(2) register and vote as they choose;
(3) assist in voter registration drives;
(4) express opinions about candidates and issues;
(5) contribute money to political organizations;
(6) attend political fund-raising functions;
(7) attend and be active at political rallies and meetings;
(8) join and be an active member of a political party or club;
(9) sign nominating petitions;
(10) campaign for or against referendum questions, constitutional amendments, and municipal ordinances;
(11) campaign for or against candidates in partisan elections;
(12) make campaign speeches for candidates in partisan elections;

(13) distribute campaign literature in partisan elections; and

(14) hold office in political clubs or parties and be delegates to party conventions.

On the other hand, Federal employees are **prohibited** from:

(a) using their official authority or influence to interfere with an election;

(b) soliciting, accepting or receiving political contributions unless both individuals are members of the same Federal labor organization or employee organization, and the one solicited is not a subordinate employee;

(c) knowingly soliciting or discouraging the political activity of any person who has business before the agency;

(d) engaging in political activity while on duty;

(e) engaging in political activity in any government office;

(f) engaging in political activity while wearing an official uniform;

(g) engaging in political activity while using a government vehicle;

(h) being candidates for public office in partisan elections; or

(i) wearing political buttons on duty.

The Hatch Act does not, *per se*, prohibit covered employees from holding public office. An individual who holds an office at the time of appointment to a Federal position may continue to serve (but they cannot run for re-election). An employee may accept an appointment to fill a vacancy and may run for office in a nonpartisan election.

If an investigation uncovers evidence of a violation and the OSC decides to prosecute, it files a written complaint with the MSPB. A copy of the complaint is served on the charged employee. The employee is given an opportunity to contest the charges, including a right to a hearing before the MSPB. After consideration of the entire record, the MSPB will notify the employee and the employing agency of its decision. If the MSPB finds a violation, it must order the removal of the employee, unless it finds by unanimous vote that the violation does not warrant removal. 5 U.S.C. § 7326; *Special Counsel v. Guyot*, 55 M.S.P.R. 163, 164 (1992). In such a case, the MSPB must order the employee suspended for not less that thirty days. *Id.*

2. Prohibited Personnel Practice Cases

Perhaps the most important duties of the OSC, and the area that will most concern Air Force representatives, involve its the authority to investigate and prosecute cases of alleged prohibited personnel practices.

a. What Is A Prohibited Personnel Practice?

The CSRA prohibits Federal employees from taking certain personnel actions against employees in covered positions for specifically enumerated reasons. Such actions are referred to as prohibited personnel practices. 5 U.S.C. § 2302.

The personnel actions covered are appointments; promotions; disciplinary or corrective actions; details, transfers, or reassignments; reinstatements; restorations; reemployments; performance evaluations; decisions concerning pay, benefits, or awards or concerning education or training likely to lead to an appointment, promotion, performance evaluation, or other personnel action. 5 U.S.C. §§ 2302(a)(2)(A)(i)-(ix). In 1994, this section was amended to include ordering an employee to undergo a psychiatric fitness for duty determination (**overturning** *Caddell v. Department of Justice*, 52 M.S.P.R. 529 (1992))

and "any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. §§ 2302(a)(2)(A)(x) and (xi). There are indications in the legislative history that the latter amendment was meant to cover actions affecting an employee's security clearance or threats concerning an employee's security clearance. *See* H. Rep. No. 103-769, 103d Cong., 2d Sess. "Gaps in Coverage" (1994); S. Rep. No. 103-358, 103d Cong. 2d Sess. 10 (1994); 140 Cong. Rec. H11421 (daily ed., October 7, 1994) (statement of Rep. McCloskey).

Covered positions include positions in the competitive service, career positions in the Senior Executive Service, and positions in the excepted service except for those excepted because of their confidential, policy-determining, policy-making or policy-advocating character and those excepted because of a Presidential determination that it is necessary and warranted by conditions of good administration. 5 U.S.C. § 2302(a)(2)(B). The 1994 amendments limit the exclusion of confidential, policy-making positions to those positions that are so designated prior to the personnel action at issue.

Federal employees are specifically prohibited from taking a personnel action against employees in covered positions because of discrimination on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation; soliciting or considering recommendations unless they are based on personal knowledge and consist of evaluations of work performance, ability, qualifications, or an evaluation of the character, loyalty, or suitability of the person; coercing political activity or reprisal for refusal to engage in political activity; deceiving or obstructing any person with respect to his or her right to compete for employment; influencing anyone to withdraw from competition for a position for the purpose of improving or injuring the prospects of another; granting any preference not authorized by law in order to improve or injure the prospects of any person for employment; engaging in nepotism; taking, or failing to take, an action in retaliation for whistleblowing; taking, or failing to take, an action in retaliation for the exercise of any appeal right; discriminating on the basis of conduct which does not adversely affect the performance of an employee or applicant; and, taking, or failing to take, any action if it violates any law, rule, or regulation implementing or directly concerning merit system principles. 5 U.S.C. § 2302(b).

b. OSC Investigations of Prohibited Personnel Practices

The OSC's authority to investigate alleged prohibited personnel practices is contained in 5 U.S.C. § 1214(a). There are generally two circumstances under which the OSC conducts an investigation. The first is when it receives an allegation from someone that an agency is committing a prohibited personnel practice.

Under 5 U.S.C. § 1214(a)(1), when the OSC receives an allegation of a prohibited personnel practice, it will investigate to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken. The OSC must acknowledge receipt of an allegation and provide the name of a contact person at the OSC to the person who made the allegation within 15 days of receipt. 5 U.S.C. § 1214(a)(1)(B). Unless it terminates the investigation, the OSC must, within 90 days of the acknowledgment, notify the person making the allegation of the status of the investigation and any action taken by the OSC since the acknowledgment. Additional notifications are required, at least, every 60 days thereafter. 5 U.S.C. § 1214(a)(1)(C). If the OSC decides to terminates an investigation, it must, at least ten days in advance, provide the person who

made the allegations with a status report containing the OSC's proposed findings of fact and legal conclusions and give him or her an opportunity to comment. In the closure letter to the individual, the OSC must explain its findings and respond to any written comments submitted by the individual. This notice cannot be used in any judicial or administrative proceeding without the consent of the person who received it. 5 U.S.C. § 1214(a)(2)(B). The OSC is required to make its determination within 240 days of receipt of an allegation. 5 U.S.C. § 1214(b)(2). If it cannot meet this deadline, the complainant may agree to an extension. In such cases, the decision must be made within the time period agreed to by the OSC and the complainant.

The OSC is prohibited from disclosing information "from or about" a complainant except in accordance with the Privacy Act. 5 U.S.C. § 1212(b). Similarly, the OSC is prohibited from responding to any inquiry regarding "an evaluation of the performance, ability, aptitude, general qualification, character, loyalty, or suitability for any personnel action of" any complainant. 5 U.S.C. § 1212(g)(2). Such information may be released only if: (1) it first obtains consent form the person about whom the information concerns; or (2) an agency requests the information in order to make a determination concerning an individual's having access to information the unauthorized disclosure of which could be expected to cause "exceptionally grave damage to the national security."

Persons who are seeking corrective action from the MSPB must seek the assistance of the OSC before filing an appeal with the MSPB unless the action is directly appealable under any law, rule, or regulation. 5 U.S.C. § 1214(a)(3); *Wardleigh v. Department of the Air Force*, 50 M.S.P.R. 622, 624-25 (1991). The request for corrective action to the OSC must allege whistleblower reprisal. *Knollenberg v. Merit Systems Protection Board*, 953 F.2d 623, 626 (Fed. Cir. 1992). The MSPB will review the OSC complaint to determine whether the individual's appeal is based on the same disclosure and the same theory as his OSC complaint. The Federal Circuit has disallowed an appeal where the appellant modified his theory of protected disclosure before the MSPB. *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 525-26 (Fed. Cir. 1992). Except for actions that are directly appealable and allegations made under the Whistleblower Protection Act (see Part Three, below), a person cannot file an appeal with the MSPB if the OSC refuses to seek corrective action.

In addition to its authority to investigate allegations that it receives under 5 U.S.C. § 1214(a)(1), the OSC has the authority to investigate on its own to determine whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken. 5 U.S.C. § 1214(a)(5). As stated in the legislative history to the CSRA: "The Special Counsel should not passively await employee complaints, but rather, vigorously pursue merit system abuses on a systematic basis. He should seek action by the Merit Board to eliminate both individual instances of merit abuse and patterns of prohibited personnel practices." S. Rep. No. 969, 95th Cong., 2d Sess. 32 (1978) reprinted in U.S. Code Cong. & Admin. News 1978 at 2754.

Once its investigation is complete, if there are reasonable grounds to believe that a prohibited practice has occurred, exists, or is to be taken, which requires corrective action the OSC is required to report this conclusion together with any findings or recommendations to the MSPB, the agency involved, and the Office of Personnel Management. 5 U.S.C. § 1214(b)(2)(A). In addition, the OSC may recommend specific corrective action to the agency involved. The OSC may also report its conclusions and recommendations to the President.

If the agency fails to implement the recommended corrective action, the OSC many initiate a proceeding before the MSPB to compel the agency to take the recommended corrective action. 5 U.S.C. § 1214(b)(2)(B). On the other hand, if the OSC, in consultation with the individual affected by the prohibited personnel practice, finds that the agency has taken corrective action, the OSC reports that finding to the MSPB along with any written comments by the individual. 5 U.S.C. § 1214(b)(2)(C).

If, in connection with any investigation, the OSC determines that there are reasonable grounds to believe that a criminal violation has occurred, it is required to report this conclusion to the Attorney General and to the head of the agency involved. It must also submit a copy of its report to the Director of the Office of Personnel Management and to the Director of the Office of Management and Budget. 5 U.S.C. § 1214(d).

If the OSC determines that there is reasonable cause to believe that there has been a violation of law, rule, or regulation that is neither a prohibited personnel practice nor a criminal violation, it is required to report that conclusion to the head of the agency involved. The OSC must require the head of the agency to certify, within 30 days of receipt, that he or she has personally reviewed the report and what action has been, or will be, taken. 5 U.S.C. § 1214(e).

c. OSC Prosecutions

If the OSC determines that there are grounds to believe that a prohibited personnel practice occurred, exists, or will be taken, and if the agency fails to take corrective action on its own, the OSC has the authority to prosecute an action before the MSPB. It may bring an action against the agency involved to force the agency to correct the action. It may also bring disciplinary actions against individual agency officials.

(1) Corrective Actions Against Agencies

If the OSC finds grounds to believe that a prohibited personnel practice has occurred, exists, or will be taken, it notifies the agency and allows an opportunity for the agency to voluntarily take corrective action. If the agency does not, the OSC will bring an action against the agency before the MSPB. Corrective action cases are defended by the CLLO.

A corrective action case is initiated by the filing of a complaint with the MSPB's headquarters. The complaint must state, with particularity, the alleged violations of law or regulation, along with the supporting facts. 5 C.F.R. § 1201.123(a). The agency has 35 days from the date of service of the complaint in which to file an answer. 5 C.F.R. § 1201.125(a). The answer must admit, deny, or explain each fact alleged in the complaint. Allegations that are unanswered or admitted are deemed to be true and cannot be denied later. 5 C.F.R. § 1201.125(b). Failure to file an answer is deemed a waiver of the right to contest the allegations in the complaint. 5 C.F.R. § 1201.125(a).

When a corrective action complaint is filed with the MSPB, it must allow an opportunity for comments by the OSC, the Office of Personnel Management, and the agency. 5 U.S.C. § 1214(b)(3)(A). However, the MSPB has broad authority to adjudicate merit systems disputes, and has the authority to conduct whatever inquiry is necessary or appropriate, including holding an evidentiary hearing. 5 U.S.C. § 1204(a)(1); *Frazier v. Merit Systems Protection Board*, 672 F.2d 150, 163-64 (D.C. Cir. 1982).

In a corrective action case, the OSC's role is that of a prosecutor. It is required to

prove its case by a preponderance of the evidence and the MSPB is not required to defer to its determination that reasonable grounds exist to believe that a prohibited personnel practice has occurred, exists, or will be taken. *Frazier v. Merit Systems Protection Board*, 672 F.2d 150, 162-63 (D.C. Cir. 1982). Generally, the OSC must prove, by preponderance of the evidence, that a prohibited personnel practice was a substantial factor in the taking, or the proposed taking, of a personnel action. In cases alleging reprisal for whistleblowing activities, the OSC must prove, by preponderance of the evidence, that the reprisal was a contributing factor in the decision to take, propose, or threat to take a personnel action. See Part Three for a discussion of whistleblower cases in general.

Should the MSPB determine that corrective action is warranted, it may order the corrective action it determines is appropriate. 5 U.S.C. § 1214(b)(4)(A). The 1994 amendments define corrective action to include placing the individual, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred and reimbursement for attorneys fees, back pay and related benefits, medical costs, travel expenses, and any other reasonable and foreseeable consequential damages. 5 U.S.C. § 1214(g). The amendments do not define consequential damages.

None of the parties to a corrective action can seek an administrative review of the MSPB's decision. However, an employee, former employee, or applicant for employment can seek judicial review of an adverse decision. 5 U.S.C. §§ 1214(c) and 7703; *Frazier v. Merit Systems Protection Board*, 672 F.2d 150, 158-60 (D.C. Cir. 1982). An agency cannot directly obtain judicial review of an MSPB decision. An agency can appeal a decision to the Federal Circuit Court of Appeals only through the Office of Personnel Management. 5 U.S.C. § 7703(d).

(2) Disciplinary Actions Against Employees

If, during the course of an investigation, the OSC determines that an agency employee should be disciplined for committing a prohibited personnel practice, it is authorized to file a complaint with the MSPB seeking the imposition of discipline. 5 U.S.C. § 1215(a)(1)(A). In exercising its authority, the OSC is not required to report its findings to the agency and afford the agency an opportunity to investigate and take disciplinary action on its own. *Special Counsel v. Filiberti*, 27 M.S.P.R. 498, 506-8 (1984) *rev'd in part on other grounds sub nom. Filiberti v. Merit Systems Protection Board*, 804 F.2d 1504 (9th Cir. 1986). Neither is the OSC prevented from seeking disciplinary action when the agency voluntarily undertakes to discipline an employee. *Special Counsel v. Russell*, 32 M.S.P.R. 114, 120 (1987). However, the OSC can decline to pursue an action when it is satisfied that the agency has taken appropriate action. *Special Counsel v. Starrett*, 28 M.S.P.R. 60, 72 (1985) *rev'd on other grounds* 792 F.2d 1246 (4th Cir. 1986).

An employee facing a disciplinary action brought by the OSC can request representation by the Air Force. Requests are approved by the SAF/GC and, if approved, the employee is represented by an Air Force attorney.

The OSC initiates a disciplinary action by filing a written complaint with the MSPB. Such a complaint must set forth, with particularity, the alleged violations of law or regulation, along with the supporting facts. 5 C.F.R. § 1201.123(a). The employee against whom the complaint is filed has the right: (1) to file an answer, supported by affidavits and documentary evidence; (2) to be represented; (3) to a hearing on the record before the MSPB or an

administrative law judge; (4) to a written decision in which the MSPB states the reasons for its conclusion(s); and (5) to a copy of any final order imposing discipline. 5 U.S.C. § 1215(a)(2); 5 C.F.R. § 1201.124(b). The employee's answer must be filed within 35 days of the date of service of the complaint. 5 C.F.R. § 1201.125(a). The answer must admit, deny, or explain each fact alleged in the complaint. Allegations that are unanswered or admitted are deemed to be true and cannot be denied later. 5 C.F.R. § 1201.125(b). Failure to file an answer is deemed a waiver of the right to contest the allegations in the complaint. 5 C.F.R. § 1201.125(a).

If the MSPB determines that discipline is warranted, it can impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed five years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000. 5 U.S.C. § 1215(a)(3). These penalties are alternative, not cumulative, and the MSPB is limited to imposing only one. *Special Counsel v. Doyle*, 45 M.S.P.R. 43 (1990). In determining what penalty to impose, the MSPB has held that it will apply the same standards it uses to determine the reasonableness of an agency's actions. *Special Counsel v. Hoban*, 24 M.S.P.R. 154 (1984); *see*, also, *Filiberti v. Merit Systems Protection Board*, 804 F.2d 1504, 1510-11 (9th Cir. 1986).

An employee against whom discipline has been imposed has no further administrative appeal rights. He or she can appeal the action to the Federal Circuit Court of Appeals. 5 U.S.C. §§ 1215(a)(4) and 7703(b). An individual who prevails in an action brought by the OSC is entitled to an award of attorneys fees. (1994 amendment **overturning** *Saldana v. Merit Systems Protection Board*, 766 F.2d 514 (Fed. Cir. 1985)).

There are several limitations placed upon the OSC's authority to bring a disciplinary action. It can only bring an action in those matters specifically authorized by statute and does not have the power to investigate and prosecute all alleged violations of law or regulation. *See Horner v. Merit Systems Protection Board*, 815 F.2d 668, 672-76 (Fed. Cir. 1987). However, as noted above, the OSC can refer suspected criminal violations to the Attorney General and other alleged violations of law or regulation to the head of an agency.

In addition, there are limitations on who can be prosecuted by the OSC. Complaints against employees in confidential, policy-making, policy-determining, or policy-advocating positions appointed by the President, by and with the advice and consent of the Senate (other than individuals in the Foreign Service) are not prosecuted before the MSPB but are presented, together with any response, to the President. 5 U.S.C. § 1215(b). Cases involving military members or contractor employees are sent, together with any recommendations for action and supporting evidence, to the head of the agency concerned. The agency head must transmit or report on the recommendations, stating the action taken or proposed to be taken, back to the OSC within 60 days. 5 U.S.C. § 1215(c).

In the context of a prosecution for whistleblower reprisal, the OSC must prove: (1) the employee had authority to take, recommend, or approve any personnel action; (2) the alleged victim of retaliation made a protected disclosure; (3) the employee used his or her authority to take, or refuse to take, a personnel action against the alleged victim; and (4) the action was taken (or failed to be taken) because of the protected disclosure. *Eidmann v. Merit Systems Protection Board*, 976 F.2d 1400, 1407 (Fed. Cir. 1992); *Special Counsel v. Santella*, 65 M.S.P.R. 452 (1994); *see*, also, *Frederick v. Department of Justice*, 65 M.S.P.R. 517 (1994) (applying the same standards to actions brought by agencies). In order to prove

that an action was taken because of a disclosure, the OSC (or an agency) must show, by a preponderance of the evidence, the retaliation was a "significant factor" in the action at issue. *Id.* A significant factor is one that plays an important role in the allegedly retaliatory action as opposed to a tangentially related motive. The significant factor test is not met if the respondent would have taken the action in the absence of a protected disclosure. To prove the significant factor requirement, the OSC (or an agency) must show that non-retaliatory motives would have been insufficient, in the absence of retaliatory motives, to cause the action to occur. *Id.*

(3) Requests for Stays

One of the most potent weapons available to the OSC is the power to ask for a stay of a pending personnel action from the MSPB. It may, at any time, request a stay of a personnel action from a member of the MSPB if it determines there are grounds to believe that a prohibited personnel practice was involved. 5 U.S.C. § 1214(b)(1). The MPSB has the power, under 5 U.S.C. § 1214(b)(1)(A)(i), to stay a personnel action that has already taken place. *Special Counsel v. Department of the Interior*, 68 M.S.P.R. 19, 23 (1995). A request for stay is automatically granted unless the member determines that, under the facts and circumstances involved, a stay is not appropriate. An initial stay becomes effective within three calendar days of the request and lasts for up to 45 days. The MSPB may extend the stay for any period it deems appropriate, but only after affording the agency an opportunity to comment.

A stay may be terminated at any time. If the termination is initiated by the MSPB or at the request of the agency, the OSC and the individual on whose behalf the stay was ordered must be given an opportunity to comment. If the termination is at the request of the OSC, the individual on whose behalf the stay was ordered must be given notice and an opportunity to comment.

The purpose of a stay is to protect the employee against a prohibited personnel practice pending investigation by the OSC and its determination of what, if any, action to take on the case. The need to protect an employee pending a determination of whether there has been a prohibited personnel practice normally overrides agency claims of undue hardship, agency efficiency, and managerial discretion during the time require to resolve the matter. *Special Counsel v. Department of the Interior*, 68 M.S.P.R. 262, 269 (1995); *Special Counsel v. Department of the Navy*, 66 M.S.P.R. 173, 175 (1995), *citing Matter of Tariela*, 1 MSPB 139, 1 M.S.P.R. 141, 144 (1979). The standards for obtaining the initial stay are quite low. The OSC need only determine that it has grounds to believe that a prohibited personnel practice has occurred, exists, or is about to be committed and the stay is granted, unless there is a specific determination that a stay is not warranted. In determining whether or not to grant an extension, the MSPB must view the record in the light most favorable to the OSC and grant an extension unless the OSC's claim is clearly unreasonable. *Special Counsel v. Department of Veterans Affairs*, 45 M.S.P.R. 271, 272-73 (1990); *Special Counsel v. Federal Emergency Management Agency*, 43 M.S.P.R. 527, 529-30 (1990). However, the MSPB is not required to grant an extension and may decline to do so where the facts and circumstances warrant. *Special Counsel v. Federal Emergency Management Agency*, 45 M.S.P.R. 512, 513-14 (1990) (extension unnecessary where agency advised MSPB in response to request for extension that it intended to take no action until the OSC

matter was concluded). In appropriate cases, the MPSB may grant an indefinite stay to the OSC in order to maintain the *status quo* while the interested parties prepare their case for presentation to the MSPB. *Special Counsel v. Department of the Interior,* 68 M.S.P.R. 537, 538 (1995).

If an agency fails to comply with a stay order, the OSC will seek enforcement from the MSPB. The MSPB has the authority to order that the employee charged with complying with the order not be paid during any period of noncompliance. 5 U.S.C. § 1204(e)(2)(A).

PART THREE - DEFENDING INDIVIDUAL RIGHT OF ACTION APPEALS

As previously stated, with one exception, the decision of the OSC not to pursue a prohibited personnel practice case before the MSPB is final and not subject to review. The exception is in cases involving allegations of whistleblower reprisal

A. OVERVIEW

In 1989 Congress enacted Public Law 101-12, the Whistleblower Protection Act of 1989 ("WPA"). The WPA substantially changed the rights of individuals claiming reprisal for whistleblowing activities. In this Part, we shall look at developments in the case law governing independent right of action cases. For purposes of representation, these cases are treated the same as appeals of personnel actions and the Air Force is represented by an attorney from the base legal office.

The WPA was enacted to correct perceived deficiencies in the protections afforded to whistleblowers. It took the OSC out from under the direct supervision of the MSPB and set it up as a totally independent agency. The OSC's power to investigate whistleblower claims was increased. The substantive law governing adjudication of claims of whistleblower retaliation was changed to make it easier for an employee to prevail. Finally, in actions that were not directly appealable to the MSPB, the WPA created the independent right of action ("IRA").

This change allows an individual complaining of reprisal for whistleblowing activities in violation of 5 U.S.C. § 2302(b)(8) to bring an action before the MSPB against an agency where the OSC has stated that it does not intend to take any action or where a period of time has passed without action by the OSC. Before bringing an IRA appeal, the individual is required to seek the assistance of the OSC.

The prohibition against whistleblower retaliation is codified at 5 U.S.C. § 2302(b)(8), which states:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--
>
> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of--
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information

> is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) any disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, or information which the employee or applicant reasonably believes evidences--
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Persons who claim that a personnel action was taken (or not taken), or threatened to be taken (or not taken), in violation of § 2302(b)(8) have three potential, and distinct, avenues for seeking redress. First, if the individual is covered by a negotiated grievance procedure, he or she may raise allegations of a prohibited personnel practice, including whistleblower reprisal, through the grievance procedure. 5 U.S.C. § 7121(g)(3)(B). Second, if the action which forms the basis of the complaint is otherwise appealable to the MSPB, the individual may file an appeal and raise the prohibited personnel practice as an affirmative defense. 5 U.S.C. § 7121(g)(3)(A). Finally, the individual may appeal to the OSC and file an individual right of action appeal with the MSPB if the OSC declines to prosecute or fails to take timely action. 5 U.S.C. § 7121(g)(3)(C). The individual must make a election of which avenue to pursue. 5 U.S.C. § 7121(g)(4). An individual is deemed to have selected the grievance procedure upon filing a timely grievance in writing. 5 U.S.C. § 7121(g)(4)(B). He or she is deemed to have selected the appeals process upon filing a timely notice of appeal. 5 U.S.C. § 7121(g)(A). And, he or she is deemed to have selected an appeal to the OSC when they make an allegation of a prohibited personnel practice to the OSC. 5 U.S.C. § 7121(g)(4)(C).

In an action that is otherwise appealable, the MSPB will review the merits and procedural aspects of the action as well as any whistleblower reprisal or other affirmative defenses. *See* 5 U.S.C. § 7701(c); *Thompson v. Department of Justice*, 61 M.S.P.R. 364, 367 (1994); *Massimino v. Department of Veterans Affairs*, 58 M.S.P.R. 318, 323 (1993). This is true even if the appellant sought corrective action from the OSC before filing the appeal. *Thompson v. Department of Justice*, 61 M.S.P.R. 364, 367 (1994); *Massimino v. Department of Veterans Affairs*, 58 M.S.P.R. 318, 322-23 (1993). On the other hand, the scope of the MSPB's review in an IRA appeal is limited solely to the whistleblower reprisal issue. *See* 5 U.S.C. § 1221(i); *Horton v. Department of the Navy*, 60 M.S.P.R. 397, 401 (1994); *Thompson v. Department of Justice*, 61 M.S.P.R. 364, 367 (1994); *Massimino v. Department of Veterans Affairs*, 58 M.S.P.R. 318, 323 (1993); *Marren v. Department of Justice*, 51 M.S.P.R. 632, 638 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table).

An appellant must exhaust his remedies with the OSC before he can file an IRA appeal with the MSPB. *Heining v. General Services Administration*, 61 M.S.P.R. 539, 547 (1994); *Zimmerman v. Department of Housing and Urban Development*, 61 M.S.P.R. 75, 78 (1994); *see Wuchinich v. Department of Labor*, 53 M.S.P.R. 220, 223 (1992). In order to exhaust his remedies with the OSC, the appellant must inform the OSC of the precise grounds for his charge of whistleblowing, giving it sufficient basis to conduct an investigation that might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992); *Knollenberg v. Merit Systems Protection Board*, 953 F.2d 623, 626 (Fed. Cir. 1992). If the appellant fails to raise an allegation of whistleblowing with the OSC before including it in an IRA appeal, it must be dismissed for lack of jurisdiction. *Heining v. General Services*

Administration, 61 M.S.P.R. 539, 547 (1994); *see*, also, *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 525 (Fed. Cir. 1992); *Knollenberg v. Department of the Navy*, 47 M.S.P.R. 92, 97 (1991) *aff'd sub nom. Knollenberg v. Merit Systems Protection Board*, 953 F.2d 623 (Fed. Cir. 1992).

If the OSC decides not to proceed with a case, it will give notice to the individual, who then has 60 days in which to bring an IRA appeal. The MSPB, in its regulations, has extended this filing period to 65 days to account for mailing of the notice. *See Wood v. Department of the Air Force*, 54 M.S.P.R. 587, 591 n. 7 (1992). Because this time period is statutory in nature, it cannot be waived for "good cause shown." *Wood v. Department of the Air Force*, 54 M.S.P.R. 587, 592 (1992); *Pashun v. Department of the Treasury*, 54 M.S.P.R. 594 (1992).[1] This 65 day period begins to run from the date the notice is issued, not from the date of postmark or the date of receipt by the individual. *Wood v. Department of the Air Force*, 54 M.S.P.R. 587, 591 (1992).

If the OSC has not acted on a request for corrective action within 120 days, the individual may bring an IRA appeal. 5 U.S.C. § 1214(a)(3)(B). The individual has the option, however, of waiting for an OSC decision on his or her request for corrective action.

There are no time limits for initiating a complaint with the OSC. Therefore, an appeal that might otherwise be untimely can be raised with the OSC and then form the basis of an IRA appeal. It is possible, however, that the MSPB will refuse to review the merits of the action as untimely and will limit its review to the allegations of whistleblower retaliation.

B. PERSONS COVERED

By its specific terms, the WPA protects employees, former employees, and applicants for employment against reprisal for protected disclosures. 5 U.S.C. §§ 1221 and 2302(b)(8). It also protects probationary employees. *Zygmunt v. Department of Health and Human Services*, 61 M.S.P.R. 379, 381 (1994); *Lewis v. Department of the Army*, 58 M.S.P.R. 325, 331 n. 4 (1993); *Wardleigh v. Department of the Air Force*, 50 M.S.P.R. 622, 624 (1991). Air National Guard technicians are also covered. *Ockerhausen v. New Jersey Department of Military and Veteran Affairs*, 52 M.S.P.R. 484, 488-89 (1992).

An employee who does not engage in protected activity may nonetheless be covered by the WPA where a retaliatory personnel action is taken against him based on the *belief* that he had engaged in protected activity. *Zimmerman v. Department of Housing and Urban Development*, 61 M.S.P.R. 75, 82-83 (1994); *Thompson v. Farm Credit Administration*, 51 M.S.P.R. 569, 580-81 (1991); *Special Counsel v. Department of the Navy*, 46 M.S.P.R. 274 (1990). An individual is also protected where a retaliatory personnel action is taken against them because of their *relationship* with an employee who has made a protected disclosure. *DiPompo v. Department of Veterans Affairs*, 62 M.S.P.R. 44, 48-49 (1994); *Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444 (1991). There are three bases for the MSPB's holdings in these cases.

First, the plain language of the WPA does not limit protection to persons who actually

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However, In *Wood* the Board did hold open the question of whether and under what circumstances the doctrines of equitable estoppel and equitable tolling might excuse a late filing.

make disclosures. The MSPB relied on the language of the statute that prohibits taking action against "any" employee because of a disclosure by "an" employee. It held that taking action against one employee because of a disclosure by another employee would fall within the statutory prohibition. *Special Counsel v. Department of the Navy*, 46 M.S.P.R. 274, 278 (1990); *Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444, 446 (1991).

Second, the MSPB found that extending the WPA's protection supported the legislative purpose of the statute. This purpose was stated in the WPA to be "to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing in the Government." The MSPB found no intent on the part of Congress to limit protection to those who actually make disclosures. On the contrary, the MSPB found that allowing reprisals against employees because they were thought to have made protected disclosures or because of their relationship to those who had would act to discourage employees from making protected disclosures and would frustrate the purpose of the statute. *Special Counsel v. Department of the Navy*, 46 M.S.P.R. 274, 278 (1990); *Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444, 446-47 (1991).

Third, the MSPB held that such protections were consistent with court interpretations of other statutes, in particular 42 U.S.C. § 2000e-3(a), prohibiting retaliation against employees for protected activity. *Special Counsel v. Department of the Navy*, 46 M.S.P.R. 274, 279 (1990), *Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444, 447 (1991).

C. STANDARD OF PROOF

To establish MSPB jurisdiction over an IRA appeal claiming alleged whistleblower reprisal, the appellant must show: (1) that he or she engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8); (2) that the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(b)(2); and (3) that appellant raised the whistleblower issue before the OSC, and OSC proceedings have been exhausted. *Nogales v. Department of the Treasury*, 63 M.S.P.R. 460, 462 (1994); *see, also, Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16 (1994); *White v. Department of the Air Force*, 63 M.S.P.R. 90, 94-95 (1994). In order to prove a claim of whistleblower reprisal, the appellant must establish, by preponderant evidence, that a protected disclosure was a contributing factor in the personnel action. *Lewis v. Department of the Army*, 63 M.S.P.R. 119, 123 (1994). To show that a protected disclosure was a contributing factor in a personnel action, an appellant must prove that the person taking the action had actual or constructive knowledge of the protected disclosure. *Id.*, at 124. This framework for adjudicating allegations of whistleblower reprisal also applies to actions that are otherwise appealable to the MSPB. *See Burroughs v. Department of Health and Human Services*, 49 M.S.P.R. 644, 651 (1991).

Once the individual establishes these factors, the burden then shifts to the agency to demonstrate by clear and convincing evidence that it would have taken (or not taken) the personnel action anyway.

1. Protected Disclosures

In order to establish a case of whistleblower reprisal, the appellant must show that he disclosed information that he reasonably believes evidences a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a

substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8*)*; *Test v. Department of the Army*, 53 M.S.P.R. 285, 287 (1992*); Ramos v. Federal Aviation Administration*, 4 MSPB 446, 4 M.S.P.R. 388, 392 (1980).

a. What Is A Disclosure?

The first part of this element is that the individual must have made a "disclosure." The MSPB has held that "[t]o 'disclose' is 'to expose; to make known; to lay bare; to reveal.'" *Horton v. Department of the Navy*, 60 M.S.P.R. 397, 402 (1994) (quoting *Black's Law Dictionary*, 417 (5th Ed. 1979)). The form of a disclosure is not important, rather it is the context in which it is made and the reasonableness of the individual's belief that are determinative factors in whether a disclosure is protected. The specific label applied to a disclosure does not determine whether or not it is protected. *Garrett v. Department of Defense*, 62 M.S.P.R. 666, 671 (1994); *Williams v. National Labor Relations Board*, 59 M.S.P.R. 640, 645 (1993); *see*, also, *White v. Department of the Air Force*, 63 M.S.P.R. 90, 96-7 (1994) (personal opinion critical of new agency policy as unworkable and untenable found to be "disclosure" of gross mismanagement).

A protected disclosure may be made to any person. There is no requirement that the whistleblowing occur through any specific channel unless the information concerns matters required by law or Presidential order to be kept confidential. 5 U.S.C. § 2302(b)(8). "[I]t is inappropriate for disclosures to be protected only if they are made … to certain employees or only if the employee is the first to raise the issue." S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988). *See*, for example, *Sirgo v. Department of Justice*, 66 M.S.P.R. 261, 265-66 (1995) (disclosures made to co-workers held protected); *Garrett v. Department of Defense*, 62 M.S.P.R. 666, 670-71 (1994) (disclosure to supervisor held protected). Similarly, there is no requirement that the disclosure be made through the chain of command, although the failure to use agency channels to secure additional information might detract from the reasonableness of the individual's belief. *See Nafus v. Department of the Army*, 57 M.S.P.R. 386, 398 (1993).

A disclosure is protected even if it is made in the course of the employee's day to day duties. *Marano v. Department of Justice*, 2 F.3d 1137, 1142-43 (Fed. Cir. 1993) (memorandum given to incoming agent in charge alleging misconduct and mismanagement in office held protected); *Connelly v. Nuclear Regulatory Commission*, 64 M.S.P.R. 28, 32-33 (1994) (disclosures to superiors about coworker's misconduct, made in the course of employee's duties, held protected); *Garrett v. Department of Defense*, 62 M.S.P.R. 666, 671 (1994) (report to supervisors that contractor had unlawfully overcharged government for overtime work held protected). A communication may be protected even if it is only meant to be helpful or provide guidance and if it discusses information known throughout an agency. *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 18-19 (1994).

b. Reasonable Belief

The second part of this element is that the discloser must reasonably believe that the disclosure evidences a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. *Dean v. Department of the Army*, 57 M.S.P.R. 296, 303 (1993); *see*, also, *Rubert v. Department of the Navy*, 51 M.S.P.R. 467, 473-74 (1991).

The MSPB has defined the term "gross mismanagement" as "more than *de minimis* wrongdoing or negligence" but "a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 17-18 (1994); *Nafus v. Department of the Army*, 57 M.S.P.R. 386, 395 (1993).

Similarly, the MSPB has defined the term "gross waste of funds" as "more than merely a debatable expenditure" but an expenditure "that is significantly out of proportion to the benefit reasonably expected to accrue to the government." *Nafus v. Department of the Army*, 57 M.S.P.R. 386, 393 (1993).

Finally, the MSPB has defined the term "abuse of authority" as "an arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 232-33 (1993).

The test for whether a putative whistleblower has a reasonable belief in the disclosure is an objective one. *See Haley v. Department of the Treasury*, 977 F.2d 553, 557 (Fed. Cir. 1992), *cert. denied*, 508 U.S. 950 (1993). "[T]he employee must only have a reasonable belief that his/her disclosure is true in order for a disclosure to be protected; the actual veracity of any disclosure, in theory, does not affect whether a disclosure is protected," and "it is inappropriate fro disclosures to be protected only if they are made for certain purposes . . . ." S. Rep. No. 413, 100th Cong., 2d Sess. 12-13 (1988). The appellant need not prove that disclosure actually establishes any of the abuses listed in 5 U.S.C. § 2302(b)(8), but he must come forward with proof, either in the form of testimony or documents, to establish that a reasonable person in the appellant's position would believe evidences such an abuse. *See Ramos v. Federal Aviation Administration*, 4 M.S.P.R. 388, 392 n. 1, 4 MSPB 446 (1980); *Haley v. Department of the Treasury*, 977 F.2d 553, 557 (Fed. Cir. 1992), *cert. denied*, 508 U.S. 950 (1993).

A reasonable belief was found in the following cases:

(1) *Eidmann v. Merit System Protection Board*, 976 F.2d 1400, 1407 (Fed. Cir. 1992) (agency smoking ban);

(2) *Paul v. Department of Agriculture*, 66 M.S.P.R. 643, 647-48 (1995) (disclosure that applicants for mineral patents were violating Federal mining laws and agency personnel were ignoring the violations);

(3) *Sirgo v. Department of Justice*, 66 M.S.P.R. 261, 266-67 (1995) (disclosure that supervisor gave employee preferential treatment based on their intimate relationship as disclosure of abuse of authority);

(4) *Owen v. Department of the Air Force*, 63 M.S.P.R. 621, 628-30 (1994) (disclosure to safety office that fumes detrimentally affected respiratory condition);

(5) *White v. Department of the Air Force*, 63 M.S.P.R. 90, 95-97 (1994) (opinion that new agency standards were unworkable and untenable as disclosure of gross mismanagement);

(6) *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 17-18 (1994) (disclosure by immigration inspector that assignments outside period of greatest led to decreased interception of illegal immigrants and adversely affected agency mission was disclosure of gross mismanagement);

(7) *Garrett v. Department of Defense*, 62 M.S.P.R. 666, 673 (1994) (auditor's

disclosure to supervisors of billing irregularities by contractors);

(8) *Heining v. General Services Administration*, 61 M.S.P.R. 539, 548-51 (1994) (disclosure of abusive treatment of subordinates as violation of regulation);

(9) *D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 234 (1993) (fraudulent time sheets as disclosure of abuse of authority);

(10) *Williams v. National Labor Relations Board*, 59 M.S.P.R. 640, 645-46 (1993) (disclosures of information obtained from others indicating supervisor's misconduct during Inspector General investigation);

(11) *Cosgrove v. Department of the Navy*, 59 M.S.P.R. 618, 620-22 (1993) (disclosure of failure to appoint qualified auditor as showing violation of agency regulation);

(12) *Shively v. Department of the Army*, 59 M.S.P.R. 531, 536-37 (1993) (disclosure consisting of relaying allegations of contract improprieties);

(13) *Braga v. Department of the Army*, 54 M.S.P.R. 392, 398 (1992), *aff'd*, 6 F.3d 787 (Fed. Cir. 1993) (Table) (claim by expert that protective clothing would not protect soldiers in real-world threat as disclosure of specific danger to public health or safety).

On the other hand, in the following cases a reasonable belief was not found:

(a) *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 525 (Fed. Cir. 1992) (allegation that scientist acted upon a misunderstanding resulting in erroneous scientific opinion found not to be disclosure of gross mismanagement; allegation that two scientists were authorized to travel to scientific meeting found not to be disclosure of gross waste of funds);

(b) *Haley v. Department of the Treasury*, 977 F.2d 553 (Fed. Cir. 1992), *cert. denied*, 508 U.S. 950 (1993) (experienced bank examiner's disagreement with agency decision was not disclosure of violation of law);

(c) *Lucas v. Department of the Navy*, 63 M.S.P.R. 455, 457-59 (1994) (objections to policy requiring police officers to turn in badges at end of shift was not disclosure of gross mismanagement);

(d) *Dean v. Department of the Army*, 57 M.S.P.R. 296, 302 (1993) (disclosure regarding granting of administrative leave for holiday party or monthly breakfast meetings not disclosure of violation of law);

(e) *Nafus v. Department of the Army*, 57 M.S.P.R. 386, 395 (1993) (disclosure about purchase of $12,000 of computer equipment not a disclosure of gross waste of funds or gross mismanagement where annual budgetary allotment was $1.5 million);

(f) *Test v. Department of the Army*, 53 M.S.P.R. 285, 287 (1992) (allegation to Congressman that agency's suspension of discloser was improper and that agency official hung up on discloser during telephone conversation failed to evidence an condition protected by statute);

(g) *Padilla v. Department of the Air Force*, 55 M.S.P.R. 540, 543 (1992) (vague allegations of wrongdoing which fail to set forth any specific law, rule, or regulation violated and broad, imprecise allegations of excessive preoccupation with self-advancement fail to state whistleblowing claim).

c. Interaction Between (b)(8) And (b)(9)

An individual will frequently claim to be the victim of whistleblower reprisal based upon a previously filed grievance, equal employment opportunity complaint, or other appeal.

The individual will allege that, during the course of the prior appeal, he or she made disclosures which showed a violation of law, rule, or regulation. The individual will then try to use this as the basis for an IRA appeal.

Such cases need to be carefully analyzed to determine whether they really state a claim of whistleblower reprisal under 5 U.S.C. § 2302(b)(8) rather than reprisal for exercising appeal, complaint, or grievance rights under 5 U.S.C. § 2302(b)(9). This distinction is important. Individuals may file IRA appeals only for whistleblower reprisal. If the claim falls under (b)(9) rather than (b)(8), the MSPB will not have jurisdiction.

The MSPB has examined the differences between the two subsections in a number of cases. In general, it has held that there is no jurisdiction where the previous case involved primarily a personal appeal right and where the "disclosure" was incidental to the appeal, *e.g.*, in cases involving EEO complaints. On the other hand, it has found jurisdiction where the prior case involved primarily a disclosure and where any personal appeal was incidental, for example, where an employee has made a disclosure of safety violations to the Occupational Safety and Health Administration.

At times the line between (b)(8) and (b)(9) becomes very blurry. When an employee makes a number of related disclosures based upon the same operative fiacts, some of which are argued to come under (b)(8) and some under (b)(9), these that come under (b)(8) provide a basis of MSPB IRA jurisdiction to review allegations of reprisal for whistleblowing. *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1035 (Fed. Cir. 1993). Thus, in *Mitchell v. Department of the Treasury*, 68 M.S.P.R. 504 (1995), the MSPB held that the availability of an unfair labor practice ("ULP") adjudicative proceeding did not, in and of itself, preclude WPA jurisdiction over whistleblowing based on the same operative facts that provided the basis of an unfair labor practice charge/complaint. The MSPB stated:

> [I]f the alleged facts underlying the ULP charge/complaint also would constitute independent violations of section 2302(b)(8), the employee discloses the facts through additional channels in such a way as to advance his whistleblowing claim, and suffers a personnel action which he alleges is retaliation for his whistleblowing disclosure, he may avail himself of the IRA procedures. *See Ellison*, 7 F.3d at 1035. In contrast, if the facts disclosed only evidenced a ULP and did not evidence any other violation of law, rule, or regulation, or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety, the disclosure is not the type which Congress intended to protect by section 2302(b)(8). *See Kelsch v. Department of Labor*, 59 M.S.P.R. 503, 509 (1993).

Mitchell v. Department of the Treasury, 68 M.S.P.R. 504, 509-10 (1995). This principle would apply to other types of appeals as well.

With this caveat, the MSPB has generally held that the following activities are not "disclosures" within the meaning of the WPA:

(1) Filing discrimination complaints. *Pessa v. Smithsonian Institute*, 60 M.S.P.R. 421, 425 (1994); *Ally v. Department of the Navy*, 58 M.S.P.R. 680, 685 (1993); *Williams v. Department of Defense and Office of Personnel Management (Intervenor)*, 46 M.S.P.R. 549 (1991).

(2) Filing grievances. *Pessa v. Smithsonian Institute*, 60 M.S.P.R. 421, 425 (1994); *Fisher v. Department of Defense*, 47 M.S.P.R. 585, 587-88 (1991).

(3) Filing unfair labor practice charges. *Grant v. Department of the Air* Force,

61 M.S.P.R. 370, 377 (1994); *Coffer v. Department of the Navy*, 50 M.S.P.R. 54, 56-57 (1991).

(4) Communicating with a congressman about a suspension where there is no evidence that the individual disclosed information for the purposes of the WPA. *Test v. Department of the Army*, 53 M.S.P.R. 285 (1992).

(5) Filing a request for correction of records under the Privacy Act. *Santillan v. Department of the Air Force*, 53 M.S.P.R. 487, 491 (1992).

(6) Filing an appeal with the MSPB. *Ruffin v. Department of the Army*, 48 M.S.P.R. 74, 78 (1991); *Metzenbaum v. Department of Justice*, 54 M.S.P.R. 32, 36 (1992).

(7) Activities of an individual in carrying out his role of union representative, including filing of EEO complaints, grievances, and unfair labor practice charges. *Wooten v. Department of Health and Human Services*, 54 M.S.P.R. 143, 146 (1992).

On the other hand, the MSPB has held that the following are protected disclosures under the WPA:

(a) Filing a workers compensation claim. *Von Kelsch v. Department of Labor*, 59 M.S.P.R. 503, 509 (1993).

(b) Making a disclosure to the Occupational Safety and Health Administration. *Smith v. Department of Agriculture*, 64 M.S.P.R. 46, 53 (1994); *Owen v. Department of the Air Force*, 63 M.S.P.R. 621, 628-30 (1994).

2. Personnel Action

The appellant must also prove that the agency has taken or threatened to take, or that it has not taken or threatened not to take, a "personnel action" within the meaning of the WPA.

The MSPB has adopted the definition of "threatened" as "to give signs of the approach of (something evil or unpleasant); indicate as impending; PORTEND (the sky [threatens] a storm)" and "to announce as intended or possible ([threaten] to buy a car.)" *Gergick v. General Services Administration*, 43 M.S.P.R. 651, 656 (1990) (quoting *Webster's Third International Dictionary* (1871)). The question of whether a personnel action has been threatened is an objective one, the appellant must articulate facts from which the MSPB may conclude that the challenged action constitutes a threatened personnel action under the totality of the facts and circumstances. A generalized, subjective fear by the appellant of future harassment, unsupported by reference to any specific matter, does not constitute a threatened personnel action. *Godfrey v. Department of the Air Force*, 45 M.S.P.R. 298, 303 (1991).

In *Gergick v. General Services Administration*, 49 M.S.P.R. 384 (1991), the MSPB held that an investigation of an employee could constitute a threatened personnel action. The MSPB pointed out that Congress intended the term "threaten" to be given a broad interpretation. Thus, the notice of a further investigation falls within the meaning of "personnel action" under the WPA where it contains a statement of facts already gathered, preliminary conclusions of apparent misconduct, and warnings of possible disciplinary action. *Gergick v. General Services Administration*, 43 M.S.P.R. 651, 655-69 (1990). On the other hand, the mere threat to undertake an inquiry or investigation may not a constitute threat of a personnel action. *Gergick v. General Services Administration*, 49 M.S.P.R. 384, 392 (1991). And, a statement advising employees that if they did not tell the truth they could be

subjected to discipline or could be subjected to a personal lawsuit did not constitute a threat. *Garst v. Department of the Army*, 56 M.S.P.R. 371, 379-80 (1993).

In *Gonzeles v. Department of Housing and Urban Development*, 64 M.S.P.R. 314, 319 (1994), the MSPB held that placing an appellant on a performance improvement plan (PIP) was, by definition, a threatened personnel action. Contrast this with *Marren v. Department of Justice*, 51 M.S.P.R. 643, 645 (1991), where the MSPB found that counseling sessions given to inform an employee that his performance had not improved and placing him on a PIP did not constitute "threatened personnel actions" under the WPA since these were lawful actions required by regulation due to the appellant's less than fully satisfactory performance evaluation (which had previously been litigated) and did not demonstrate retaliation for whistleblowing.

The term "personnel action" is defined in 5 U.S.C. § 2302(a)(2)(A), as follows:

> (A) "personnel action" means—
> (i) an appointment;
> (ii) a promotion;
> (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
> (iv) a detail, transfer, or reassignment;
> (v) a reinstatement;
> (vi) a restoration;
> (vii) a reemployment;
> (viii) a performance evaluation under chapter 43 of this title;
> (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and
> (x) a decision to order psychiatric testing or examination; and
> (xi) any other significant change in duties, responsibilities, or working conditions;
> with respect to an employee in, or applicant for, a covered position in an agency;

Subclauses (x) and (xi) were added by the 1994 amendments to the WPA. The new subclause (x) was added to overturn the MSPB's decision in *Caddell v. Department of Justice*, 52 M.S.P.R. 529 (1992). There are indications in the legislative history that the subclause (xi) was meant to cover actions affecting an employee's security clearance or threats concerning an employee's security clearance. *See* H. Rep. No. 103-769, 103d Cong., 2d Sess. "Gaps in Coverage" (1994); S. Rep. No. 103-358, 103d Cong. 2d Sess. 10 (1994); 140 Cong. Rec. H11421 (daily ed., October 7, 1994) (statement of Rep. McCloskey).

In a number of cases, the MSPB has tried to clarify what actions are, and are not, "personnel actions" which can form the basis of an IRA appeal. In general, the MSPB has strictly applied the statutory definition and has refused to extend its application to actions that are not specifically enumerated. Thus, the MSPB has held that the following are *not* "personnel actions" under the WPA:

(1) Denial of official time for an employee to prepare a petition for review. *Marren v. Department of Justice*, 50 M.S.P.R. 369 (1991). The MSPB held that the denial of official time was not a decision concerning a "benefit" within the meaning of 5 U.S.C. § 2302(a)(2)(A)(ix). On the other hand, the MSPB found that the denial of annual leave was a "personnel action."

(2) Requesting an audit of an employee's records. *Marren v. Department of Justice*, 50 M.S.P.R. 474 (1991). The MSPB held that requesting an audit was not a decision concerning pay or benefits.

(3) Failing to send an appellant to a conference. *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 326 (1991). The MSPB found that the conference was not a regularly recurring event, was not a training event that constituted a personnel action, and that it was primarily held for the benefit of field agents, not for someone in the appellant's position.

(4) Assigning a lower graded individual to be an appellant's temporary supervisor while the regular supervisor attended a conference. *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 326 (1991). The MSPB found that the supervision by a lower-graded employee was not a personnel action because it did not constitute a significant change in duties inconsistent with the appellant's grade and because it had no effect on the appellant's day to day duties and responsibilities.

(5) Removing an employee from coverage under a compressed workweek plan. *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 337 (1991).

(6) Assigning an acting supervisor. *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 337 (1991).

(7) Delegating approval of an appellant's performance evaluation to someone who was not the "pool manager." *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 337 (1991).

(8) Ordering an appellant to undergo a fitness-for-duty examination. *Caddell v. Department of Justice*, 52 M.S.P.R. 529 (1992). But, note, the 1994 amendments to the WPA have overturned this decision. 5 U.S.C. § 2302(a)(2)(A)(x).

(9) Changing the appellant's reporting supervisor. *Wagner v. Environmental Protection Agency*, 53 M.S.P.R. 300 (1992).

(10) A decision to cancel a vacancy announcement. *DiPompo v. Department of Veterans Affairs*, 62 M.S.P.R. 44, 48 (1994); *Shively v. Department of the Army*, 56 M.S.P.R. 531, 536 (1993); *Slake v. Department of the Treasury*, 53 M.S.P.R. 207 (1992).

(11) Failure to advise an employee of a vacancy announcement. *DiPompo v. Department of Veterans Affairs*, 62 M.S.P.R. 44, 48 (1994).

(12) Falsely telling an employee that an agency does not have a vacancy for which he is qualified. *DiPompo v. Department of Veterans Affairs*, 62 M.S.P.R. 44, 48 (1994).

(13) An alleged falsification of an appellant's records. *Santillan v. Department of the Air Force*, 53 M.S.P.R. 487, 492 n. 5 (1992).

(14) An appellant's arrest and treatment by an agency while under arrest. *Weber v. General Services Administration*, 54 M.S.P.R. 444, 445-6 (1992).

(15) An alleged false evaluation of an employee's qualifications for promotion. *Kochanoff v. Department of the Treasury*, 54 M.S.P.R. 517, 520 (1992).

(16) A change in shifts. *Kochanoff v. Department of the Treasury*, 54 M.S.P.R. 517, 521 (1992).

(17) Abolishing a position. *Dean v. Department of the Army*, 57 M.S.P.R. 296, 305-6 (1993).

(18) A reduction in force action. *Carter v. Department of the Army*, 56 M.S.P.R. 321, 323-24 (1993).

(19) With respect to Air National Guard technicians, certain actions exempted from review by 32 U.S.C. § 709(e), *i.e.*, separation for civilian employment in instances involving loss of a required military Guard membership or a military grade specified for the position, separation from civilian employment as a result of failure to meet military security standards, separation for cause by the Adjutant General, and reduction in force or adverse action involving discharge, suspension, furlough without pay, or reduction in rank or compensation. *Ockerhausen v. New Jersey Department of Military and Veteran Affairs*, 52 M.S.P.R. 484, 489 (1992).

3. Contributing Factor

The appellant in an IRA appeal has the burden of showing that the protected disclosures was a contributing factor in the decision to take (or not take) a personnel action against him or her. 5 U.S.C. §§ 1214(b)(4) and 1221(e); *Lewis v. Department of the Army*, 63 M.S.P.R. 119, 123 (1994); *Caddell v. Department of Justice*, 52 M.S.P.R. 529, 533 (1992); *Rychen v. Department of the Army*, 51 M.S.P.R. 179, 183 (1991); *McDaid v. Department of Housing and Urban Development*, 46 M.S.P.R. 415, 420-21 (1990). This does not require proof of and intent to retaliate. "[A] whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action; 'Regardless of the official's motives, personnel actions against employees should quite [simply] not be based on protected activities such as whistleblowing.'" *Marano v. Department of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (quoting S. Rep. No. 413, 100th Cong., 2d Sess. 16 (1988)). The contributing factor is "'any factor, which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.'" *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (quoting 135 Cong. Rec. 5033 (1989)). Personnel actions may be taken because of a number of different factors, "only one of which must be a protected disclosure and a contributing factor to the personnel action in order for the WPA's protection to take effect. Indeed, the legislative history of the WPA emphasizes that 'any' weight given to the protected disclosure, either alone or even in combination with other factors, can satisfy the 'contributing factor' test." *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

Usually, there will not be direct evidence of a retaliatory motive and the appellant will have to show the necessary connection by circumstantial evidence since "[s]upervisors do not usually write down or tell other employees of their intent to take prohibited reprisal against an employee." *Hathaway v. Merit Systems Protection Board*, 981 F.2d 1237, 1242 (Fed. Cir. 1992). While the MSPB has stated that there are many ways to establish this connection, it has recognized the following methods.

One method is by showing that the agency official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. *Braga v. Department of the Army*, 54 M.S.P.R. 392, 396 (1992*); McDaid v. Department of Housing and Urban Development*, 46 M.S.P.R. 416, 421 (1990). The appellant can show that the agency official had actual knowledge either by direct evidence of knowledge, *Gergick v. General Services Administration*, 43 M.S.P.R. 661 (1990) (action issued to appellant included specific reference to the appellant's complaints to the OSC and to the agency's

Inspector General); or through circumstantial evidence. *McClellan v. Department of Defense*, 53 M.S.P.R. 139 (1992) (appellant made disclosures that were subject of a Congressional inquiry and evidence showed that, in the normal course of business, the responsible agency official reviewed and discussed Congressional inquiries at weekly briefings). An appellant can show constructive knowledge by showing that individuals with actual knowledge of the disclosure influenced the official's action. *Frazier v. Merit Systems Protection Board*, 672 F.2d 150, 166-68 (D.C. Cir. 1982).

Another method of showing is to show that the notice and decision on the action occurred closely enough in time to the disclosure for a reasonable person to conclude that the disclosure was a factor in the personnel action. See *Rychen v. Department of the Army*, 51 M.S.P.R. 179, 183 (1991) (disclosure on 1 Jun 90, notice on 27 Jun 90 and decision on 13 Jul 90, connection found); *cf. McDaid v. Department of Housing and Urban Development*, 46 M.S.P.R. 416, 422-23 (1990) (disclosure in February 1988 and decision on 4 Dec 89, no connection found). However, the MSPB has also held that it will not find a presumption of connection where the timing of the personnel action is mandated by statute or regulation and thus is outside the control of the deciding official. *Wagner v. Environmental Protection Agency*, 51 M.S.P.R. 337, 346 (1991); *Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 455 (1992).

A common problem is the appellant who, faced with a disciplinary action, makes a protected disclosure in order to raise a whistleblower retaliation claim. The MSPB has held that persisting in discipline decided on *before* learning of protected disclosures does not, by itself, transform the discipline into a prohibited personnel practice. Supervisors are *not* required to change a decision once they learn that the employee has engaged in whistleblowing. *Dean v. Department of the Army*, 57 M.S.P.R. 296, 303 (1993); *see*, also, *Charest v. Federal Emergency Management Agency*, 54 M.S.P.R. 436, 438 (1992); *Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 605 (1991).

D. THE AGENCY'S BURDEN

Once the appellant has established a case of probable whistleblower reprisal, the burden shifts to the agency to demonstrate, by clear and convincing evidence, that retaliation was not a factor, that is, that it would have taken the personnel action anyway.

The "clear and convincing" standard has been defined by the MSPB as "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *See Gergick v. General Services Administration*, 43 M.S.P.R. 651, 662-63 (1990); 5 C.F.R. § 1209.4(d). It is a higher standard of proof than preponderance of the evidence and has been justified on the grounds that, in proving the basis for an agency's decision, the agency controls "most of the cards," such as the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. See 135 Cong.Rec. H747 (daily ed. Mar. 21, 1989); *McDaid v. Department of Housing and Urban Development*, 46 M.S.P.R. 416, 421 (1990).

In general, the MSPB has based its review under the clear and convincing standard on an analysis of the propriety of the agency's action and a determination of whether or not the penalty was reasonable under the circumstances. In the following cases, the MSPB found that the agency met its burden:

(1) In *McDaid v. Department of Housing and Urban Development*, 46 M.S.P.R. 416 (1990), the appellant was suspended for three days, effective 12 Dec 89, on charges of rude and disrespectful behavior towards a supervisor and failure to follow supervisory instructions. The appellant claimed that the suspension was in retaliation for a complaint he had filed with the agency's Inspector General in February 1988. The MSPB found that the agency had proven the charges against the appellant and that the penalty was reasonable under the circumstances. In light of the non-retaliatory motives for taking the action, the MSPB concluded that the agency had shown by clear and convincing evidence that it would have taken the suspension action absent any retaliatory motive.

(2) In *Charest v. Federal Emergency Management Agency*, 54 M.S.P.R. 436 (1992), the appellant was given a reprimand for disrespectful conduct and abusive language. The MSPB found that the agency had met the clear and convincing standard because it had proven the case against the appellant and because it showed that a reprimand was the least action that could be taken under the agency's table of penalties.

(3) In *Rychen v. Department of the Army*, 51 M.S.P.R. 179 (1991), the appellant received a suspension for misuse of government property. The MSPB found that the agency had proven its case and that a suspension was a reasonable penalty under the circumstances. It also found that the agency had adequately explained alleged disparate treatment of the appellant in comparison with another employee who had committed similar offenses.

(4) In *Crist v. Department of the Navy*, 50 M.S.P.R. 35 (1991), the appellant was removed from his position as Supervisory Engineer for deliberately refusing to carry out his supervisor's instructions. He appealed, alleging that he was retaliated against for his disclosures of improper dumping and burial of hazardous waste on federal property. At hearing, it was found that the agency had done nothing improper and that the deciding official had in no way been discomfited by the alleged disclosures. On the other hand, the judge found that the appellant was aware of and capable of following his supervisor's directives and that he showed little possibility of rehabilitation in view of his abject failure to acknowledge any impropriety. Thus, the MSPB found that there was no nexus between the alleged retaliation and the removal.

E. REMEDIES

Recently, the MSPB has considered what remedies are available in an IRA appeal. In *Weaver v. Department of Agriculture*, 55 M.S.P.R. 569 (1992), the agency proposed to remove the appellant for various acts of misconduct. The deciding official rejected some of the charges and mitigated the penalty to a 30-day suspension. The appellant appealed to the MSPB, claiming that the action was taken, in part, for his whistleblowing activity. The administrative judge took jurisdiction under both 5 U.S.C. § 7701 (appeal of a Chapter 75 adverse action) and 5 U.S.C. § 1221 (IRA). The judge found that there was no reprisal but mitigated the penalty to a 15-day suspension.

The MSPB overturned the judge's jurisdictional findings under 5 U.S.C. § 7701. It found that, because the appellant had already been in a nonduty, nonpay status due to an injury, the suspension did not affect his pay and was not an adverse action. The MSPB went on to say that in a pure IRA appeal the judge cannot mitigate an agency's action. If the judge finds reprisal, he or she must grant corrective action. If the judge finds there was no reprisal, he or she grants no remedy.

In the 1994 amendments to the WPA, Congress amended 5 U.S.C. §§ 1214 and 1221 to clarify what was meant by "corrective action." Corrective action ordered by the MSPB may include: (1) placement of the appellant as nearly as possible in the *status quo ante*; and (2) reimbursement for attorneys fees, back pay and related benefits, medical costs incurred, travel expenses, and "any other reasonable and foreseeable consequential damages." The amendments do not define what is meant by "consequential damages."

F. AGENCY DEFENSE STRATEGIES

In an action before the MSPB, the agency's first line of defense is a challenge to the MSPB's jurisdiction. In an IRA appeal, this means establishing that the appellant has not made a protected disclosure or has not been subjected to a personnel action. In either event, it is helpful to keep in mind that the MSPB's decisions have construed both of these requirements fairly narrowly.

The appellant has the burden of making a nonfrivolous showing of MSPB jurisdiction over the appeal. *Alford v. Department of the Army*, 47 M.S.P.R. 271, 274 (1991). Even then, the MSPB has held that the appellant does not have the right to a hearing on the question of jurisdiction if the nonfrivolous allegation of jurisdiction can be decided based on the documentary evidence of record. *Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 451 (1992); *see* also *Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1428 (Fed. Cir. 1984); *Jarman v. Small Business Administration*, 44 M.S.P.R. 514, 516 (1990); *O'Neal v. United States Postal Service*, 39 M.S.P.R. 645, 649 *aff'd*, 887 F.2d 1095 (Fed. Cir. 1989) (Table).

Because of this, the agency's response to the administrative judge's Acknowledgment Order takes on even greater importance. The agency has an opportunity to build the record in its response and to use that record as the basis for a decision on the jurisdictional issue. Thus, the agency should submit, as part of its response, all documents as well as supporting affidavits from key witnesses.

If the case cannot be dismissed on jurisdictional grounds, the agency must be prepared to develop and introduce evidence to refute a claim that the appellant's whistleblowing contributed to the personnel action or that there is a nexus between the two. If all else fails, the agency must be prepared to show, by clear and convincing evidence, that it would have taken the personnel action anyway.

In this context, it becomes even more important to select an appropriate and reasonable penalty in a case involving an adverse action. An unduly harsh penalty not only increases the odds that a judge will mitigate the penalty, it may also be viewed as evidence of reprisal or be viewed as refuting a defense that the agency would have taken the action anyway. Thus, an agency must be able to establish, under the criteria set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 5 MSPB 313 (1981), that the penalty was reasonable.

PART FOUR - APPEALS TO THE DEPARTMENT OF LABOR

In addition to the WPA, there are a number of Federal statutes which contain protections for workers who blow the whistle on violations. Some of these statutes relate to particular industries, *e.g.*, the Federal Mine Safety and Health Act. Others focus on particular employment practices, on workplace safety, or on environmental issues and apply across

industry boundaries. The provisions of the various statutes are summarized in Table 1 at the end of this primer.

These Federal laws vary with respect to the substantive protections afforded, the agencies responsible for their enforcement, the procedures for enforcement, and the remedies available. In this part, we will look at the procedures for appeals to the Department of Labor ("DoL"). DoL is generally responsible for enforcing the whistleblower protection provisions contained in a number of environmental statutes. DoL has promulgated regulations which set forth uniform coverage, procedures, and remedies. These regulations can be found at Title 29, Code of Federal Regulations, Part 24.

A preliminary question that arises is whether DoL has jurisdiction to enforce these whistleblower protection provisions against Federal agencies—either because Congress has not clearly waived sovereign immunity or because they have been preempted by the CSRA and WPA.

Both questions were raised in *Conley v. McClellan Air Force Base*, USDOL Case No. 84-WPC-1 (1993). In that case, the complainant alleged that he was reprimanded by the Air Force in violation of the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act or "CWA"), 33 U.S.C. §§ 1251, *et seq.* The whistleblower protection provisions are in 33 U.S.C. § 1367, which states:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee…by reason of the fact that such employee…has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

Although expressly holding that the United States is not a "person" within the meaning of this provision, Labor Secretary Reich went on to hold that this provision is a "Federal…requirement…respecting the control and abatement of water pollution …." so as to bring it within the waiver of sovereign immunity contained in 33 U.S.C. § 1323(a). Secretary Reich also held that neither the CSRA nor the WPA had impliedly repealed these provisions. After finding that DoL had jurisdiction, Secretary Reich held that the Air Force had not violated the CWA, finding that the complainant was reprimanded for a legitimate, nondiscriminatory reason.

In a subsequent case, *Marcus v. Environmental Protection Agency*, USDOL Case No. 92-TSC-5 (1994), Secretary Reich ruled that that the Environmental Protection Agency had violated the whistleblower protection provisions of various environmental statutes. Pointing to "exceptionally broad coverage" in the Comprehensive Environmental Response, Compensation, and Liability ("CERCLA" or "Superfund") as evidence of Congressional intent to waive governmental immunity, he held that these statutes reached Federal employees even though they are not explicitly mentioned. Once again, an argument that the CSRA superseded these statutes was rejected. In this case, Secretary Reich found that the Environmental Protection Agency *had* retaliated against a toxicologist by firing him after he publicly criticized its policy on the cancer risk from fluoride in drinking water. The Secretary issued a make-whole order that included reinstatement with full back pay, retroactive health insurance coverage, and $50,000 in compensatory damages. Although two of the statutes involved authorized an award of exemplary damages, none were awarded in this case.

An employee who believes that he or she has been retaliated against may file a complaint with DoL's Office of the Administrator of the Wage and Hour Division. 29 C.F.R. § 24.3(d). The complaint must be in writing and include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute reprisal. 29 C.F.R. § 24.3(c). A complaint must be filed within 30 days of the alleged retaliation. 29 C.F.R. § 24.3(b).

Upon receipt of a complaint, the Administrator notifies the complainant and the agency and conducts a priority investigation of the complaint. 29 C.F.R. § 24.4. The Administrator is authorized to enter and inspect places and documents (and make copies thereof), question witnesses, and require the production of documents or other evidence. 29 C.F.R. § 24.4(b). The Administrator must complete the investigation, determine whether there has been a violation, and give notice of the determination together with a statement of the reasons therefore within 30 days. 29 C.F.R. § 24.4(d)(1). A notice of the determination is sent to the complainant, the respondent agency, and to the representatives. The original complaint and a copy of the notice of determination are filed with the DoL's Chief Administrative Law Judge. If the Administrator determines that there is no merit to the complaint, the notice of determination becomes final unless the complainant files a request by telegram for a hearing with the Chief Administrative Law Judge within five calendar days of receipt of the notice. 29 C.F.R. § 24.4(d)(2)(i). If the Administrator determines that the violation has occurred, the notice of determination will contain an abatement order and will become final unless the agency files a request by telegram for a hearing with the Chief Administrative Law Judge within five calendar days of receipt of the notice. 29 C.F.R. § 24.4(d)(3)(i).

If a hearing is requested, the administrative law judge assigned to the case will, within seven calendar days of receipt of the request, notify the parties of the day, time, and place for the hearing. 29 C.F.R. § 24.5(a). The administrative law judge will issue a recommended decision within 20 days of the hearing. 29 C.F.R. § 24.6(a). The decision is sent to the Secretary of Labor for a final order. The Secretary is required to issue a final order within 90 days after receipt of a complaint. 29 C.F.R. § 24.6(b)(1). If the Secretary concludes that retaliation has occurred, the final order shall order the agency to take appropriate corrective action, including reinstatement of the complainant together with the compensation, terms, conditions, and privileges of employment and, in appropriate cases, compensatory damages. 29 C.F.R. § 24.6(b)(2). If a party is dissatisfied with the final order, he or she may file a petition for review of the order in the United States court of appeals for the circuit in which the violation allegedly occurred. 29 C.F.R. § 24.7(a). A petition for review must be filed within 60 days after issuance of the final order. Such orders are reviewed under the Administrative Procedures Act, 5 U.S.C. § 706, and the final order will be upheld unless it is unsupported by substantial evidence or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See*, for example, *Pogue v. United States Department of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991).

The hearings before DoL administrative law judges are open to the public and a record is mechanically or stenographically reported. 29 C.F.R. § 24.5(e)(2). Parties are allowed to present oral arguments and may submit prehearing briefs. 29 C.F.R. § 24.5(e)(3). Hearings are conducted in accordance with the procedural regulations at Title 29, Code of Federal Regulations, Part 18.

The agency representative who is confronted with an appeal to DoL must be prepared

to act expeditiously. The investigation will be completed in a very short period of time and a decision to ask for an administrative hearing must be made quickly. The remedies available are more extensive than those available under the WPA and can include awards of compensatory damages and, in some cases, exemplary damages.

TABLE 1 - Statutes With Whistleblower Protection Provisions

Statute	Responsible Agency	Substantive Protection	Procedures and Remedies	Applicable to Federal Agencies
Age Discrimination in Employment Act (ADEA); 29 U.S.C. §§621, *et seq*.; §623 contains the anti-retaliation provisions.	Equal Employment Opportunity Commission.	Retaliation prohibited for opposing unlawful practices, testifying, participating or assisting in enforcement proceedings.	Administrative investigation which may result in prosecution by the EEOC or by employee in U.S. District Court. Remedies include reinstatement, back pay, liquidated damages for willful violations, and attorneys fees.	No. §633a contains provisions relating to Federal agencies. Under §633a(f), other provisions of ADEA, except for §631(b) do not apply to Federal agencies.
Asbestos Hazard Emergency Response Act of 1986; 15 U.S.C. §§2641, *et seq*.; §2651 contains the anti-retaliation provisions.	Department of Labor.	Retaliation prohibited for reporting asbestos in schools to any person, including state or Federal government.	Administrative investigation (90 days to file complaint), action may be brought by Secretary of Labor on employee's behalf in U.S. District Court. Remedies include reinstatement and back pay.	Yes. Act covers "local educational agencies." §2642(7) includes the governing authority of any school operated under the Defense dependents education system within the definition of "local educational agency."
Asbestos School Hazard Detection Act of 1980; 20 U.S.C. §§ 3601, *et seq*.; §3608 contains the anti-retaliation provisions.	None.	Retaliation prohibited, by state or local educational agencies receiving Federal assistance to remove asbestos, against employees who bring asbestos problems in schools to attention of public.	None.	Yes. §3610(5)(B) includes schools operated by any agency of the United States.

Statute	Responsible Agency	Substantive Protection	Procedures and Remedies	Applicable to Federal Agencies
Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. §§1211-1222; 2301-2305.	Office of Special Counsel.	Prohibits retaliation against Federal employees who disclose violations of law, rule or regulation; gross waste of funds; gross mismanagement; or specific danger to public safety or health.	Investigation by the Office of Special Counsel which can seek corrective action from the Merit Systems Protection Board. Individual can bring action on own behalf before the Merit Systems Protection Board is OSC refuses to act or does not timely act.	Yes.
Clean Air Act (CAA); 42 U.S.C. §§7401, *et seq*.; §7622 contains the anti-retaliation provisions.	Department of Labor.	"Employers" prohibited from retaliating against "employees" for commencing proceedings, or for testifying, assisting, or participating in enforcement proceedings.	Administrative hearing before ALJ (30 days to file complaint), review by Secretary of Labor, appeal to U.S. Court of Appeals. Remedies include reinstatement, back pay, compensatory damages, and attorneys fees.	Yes. *See Marcus v. Environmental Protection Agency*, USDOL Case No. 92-TSC-5 (1994).
Clean Water Act (CWA) [See Federal Water Pollution Control Act]				
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA); 42 U.S.C. §§9601, *et seq*.; §9610 contains the anti-retaliation provisions.	Department of Labor.	"Persons" are prohibited from retaliating for providing information to state or Federal government, filing or testifying in enforcement proceedings.	Administrative investigation by Secretary of Labor (30 days to file complaint), including opportunity for public hearing, appeal to U.S. Court of Appeals. Remedies include reinstatement, back pay, and attorneys fees.	Yes. §9601(21) includes the United States in the definition of "person."

Statute	Responsible Agency	Substantive Protection	Procedures and Remedies	Applicable to Federal Agencies
Department of Defense Authorization Act of 1984, 10 U.S.C. §1587.	Department of Defense.	Prohibits retaliation against DoD civilian employees for disclosing violations of laws, rules, or regulations, mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety.	Administrative investigation by Secretary of Defense, who has authority to correct adverse personnel actions.	Yes. This statute protects nonappropriated fund employees against retaliation.
Department of Defense Authorization Act of 1987, 10 U.S.C. §2409	Department of Defense.	Prohibits retaliation against defense contractor employees who disclose substantial violations of law relating to defense contracts to Members of Congress or authorized representatives of DoD or DoJ.	Administrative investigation by DoD IG, who is required to submit a report to the Secretary of Defense.	No. This statute protects employees of Defense contractors.
Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1001 *et seq.* §1140 contains the anti-retaliation provisions.	None	Prohibits retaliation for giving information, or testifying in any inquiry or proceeding.	Civil action in U.S. District Court for reinstatement, back pay, and attorneys fees.	No. Statute makes it unlawful for any "person" to retaliate. Definition of "person" does not include the United States.
Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §§5801 *et seq.* §5851 contains the anti-retaliation provisions.	Department of Labor.	Prohibits retaliation for commencing proceedings, or for testifying, assisting, or participating in enforcement proceedings.	Administrative hearing before ALJ, review by Secretary of Labor, appeal to U.S. Court of Appeals. Remedies include reinstatement, back pay, compensatory damages, and attorneys fees.	No. Statute makes it unlawful for any "employer" to retaliate. Definition of "employer" does not include the United States.

Statute	Responsible Agency	Substantive Protection	Procedures and Remedies	Applicable to Federal Agencies
Equal Employ-ment Oppor-tunity Act (Title VII), 42 U.S.C. §§2000e *et seq.*, §20003-3(a) contains the anti-retaliation provisions.	Equal Employment Opportunity Commission.	Prohibits retaliation for opposing unlawful practices or testifying, participating, or assisting in enforcement proceedings.	Administrative investigation which may result in prosecution by EEOC or by employee in U.S. District Court. Remedies include reinstatement, back pay, attorneys fees, interest, compensatory damages, and punitive damages.	Yes. However, Federal agency procedures call for informal counseling by agency; formal investigation by agency; hearing before EEOC or MSPB administrative judge; review by EEOC and/or MSPB; *de novo* review in U.S. District Court. Compensatory damages capped at $300,000 and no punitive damages allowed against United States.
Fair Labor Standards Act (FLSA), 29 U.S.C. §215(a)(3).	U.S. District Court or State Court.	Prohibits retaliation for filing complaint, testifying in proceedings, or serving on industry committee.	Civil action in state or Federal court for reinstatement, back pay, liquidated damages, and attorneys fees.	No. It is unlawful for any "person" to discriminate. Definition of "person" does not include the United States.
Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.* §60 contains the anti-retaliation provisions.	None.	Prohibits retaliation for providing information regarding death or injury of employee.	Civil action in U.S. District Court for reinstatement and back pay.	No. Applies to "common carriers" not the United States.
Federal Mine Safety and Health Act (FMSHA), 30 U.S.C. §§801 *et seq.* §815(c) contains the anti-retaliation provisions.	Federal Mine Safety and Health Review Commission.	Prohibits retaliation for commencing proceedings, or for testifying or assisting in enforcement proceedings.	Administrative hearing before ALJ, review by Federal Mine Safety and Health Review Commission, appeal to U.S. Court of Appeals. Remedies include reinstatement, back pay, and attorneys fees.	No. Definition of persons who may not discriminate does not include the United States.

Statute	Responsible Agency	Substantive Protection	Procedures and Remedies	Applicable to Federal Agencies
Federal Water Pollution Control Act of 1972, 33 U.S.C. §§1251 *et seq.* §1367 contains the anti-retaliation provisions.	Department of Labor.	Prohibits retaliation for commencing proceedings, or for testifying, assisting, or participating in enforcement proceedings.	Administrative hearing before ALJ, review by Secretary of Labor, appeal to U.S. Court of Appeals. Remedies include reinstatement, back pay, compensatory damages, and attorneys fees.	Yes. *See Conley v. McClellan Air Force Base*, USDOL Case No. 84-WPC-1 (1993).
Hazardous Substances Release Act, 42 U.S.C. §§9601 *et seq.* §9610 contains the anti-retaliation provisions.	Secretary of Labor.	Prohibits retaliation for providing information, or for testifying in proceedings.	Administrative hearing, appeal to U.S. Court of Appeals. Remedies include reinstatement, back pay, compensatory damages, and attorneys fees.	Yes. Yes. *See Marcus v. Environmental Protection Agency*, USDOL Case No. 92-TSC-5 (1994).
International Safe Containers Act, 42 U.S.C. §§1501, *et seq.* §1506 contains the anti-retaliation provisions.	Department of Labor.	Prohibits retaliation for reporting existence of unsafe container to Secretary of Transportation.	Administrative investigation by Secretary of Labor, who may file action in U.S. District Court for reinstatement and back pay.	No.
Jurors' Employment Protection Act, 28 U.S.C. §§1861 *et seq.* §1875 contains the anti-retaliation provisions.	U.S. District Court.	Prohibits retaliation for jury service in Federal courts.	Employees may apply to U.S. District Court for appointment of counsel. Remedies include reinstatement, back pay, no loss of seniority or benefits, and $1000 civil penalty per violation per employee.	No.

Statute	Responsible Agency	Substantive Protection	Procedures and Remedies	Applicable to Federal Agencies
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* §948a contains the anti-retaliation provisions.	U.S. Department of Labor Benefits Review Board.	Prohibits retaliation for have sought workers' compensation, or for testifying in proceedings.	Administrative hearing before ALJ. Remedies include reinstatement, back pay, and penalties of not less than $1000 nor more than $5000 for violation.	No.
Migrant Seasonal and Agricultural Worker Protection Act, 29 U.S.C. §§1801 *et seq.* §1855 contains the anti-retaliation provisions.	Department of Labor.	Prohibits retaliation against migrant workers who, with just cause, file or testify in proceedings, or who exercise any other right under the Act.	Administrative investigation by the Secretary of Labor who may bring a civil action in U.S. District Court for reinstatement, back pay, and other damages.	No.
Occupational Safety and Health Act (OSHA), 29 U.S.C. §§651 *et seq.* §660 contains the anti-retaliation provisions.	Occupational Safety and Health Administration.	Prohibits retaliation for filing complaint, testifying in enforcement proceedings, or exercise of any other rights under OSHA.	Administrative investigation, action may be brought by agency on employee's behalf in U.S. District Court. Remedies include reinstatement and back pay.	No. Definition of "employer" excludes the United States.
Public Health Service Act, 42 U.S.C. §§201 *et seq.* §300a-7 contains the anti-retaliation provisions.	None.	Prohibits retaliation for refusal to participate in sterilization, abortion, or research, on religious or moral grounds.	None.	No.

Statute	Responsible Agency	Substantive Protection	Procedures and Remedies	Applicable to Federal Agencies
Railroad Safety Authorization Act, 49 U.S.C. §§20101 *et seq.* §20109 contains the anti-retaliation provisions.	National Railroad Adjustment Board.	Prohibits retaliation for complaints regarding enforcement of Federal railroad safety laws, testifying in enforcement proceedings, or refusal to work under hazardous conditions.	Administrative investigation which must be completed within 180 days. Remedies include reinstatement, back pay, and punitive damages not to exceed $20,000.	No. Applies to railroad carriers.
Resource Conservation and Recovery Act (RCRA) [See Solid Waste Disposal Act]				
Safe Drinking Water Act (SDWA), 42 U.S.C. §§300f *et seq.* §300j-9 contains the anti-retaliation provisions.	Department of Labor.	Prohibits retaliation for commencing proceedings, or for testifying, assisting, or participating in enforcement proceedings.	Administrative hearing before ALJ, review by Secretary of Labor, appeal to U.S. Court of Appeals. Remedies include reinstatement, back pay, compensatory damages, attorneys fees costs and expenses, and exemplary damages.	Yes. United States is specifically included in definition of "person" for coverage. *See Marcus v. Environmental Protection Agency*, USDOL Case No. 92-TSC-5 (1994).
Solid Waste Disposal Act (SWDA), 42 U.S.C. §§6901 *et seq.* §6971 contains the anti-retaliation provisions.	Department of Labor.	Prohibits retaliation for commencing proceedings, or for testifying, assisting, or participating in enforcement proceedings.	Administrative hearing before ALJ, review by Secretary of Labor, appeal to U.S. Court of Appeals. Remedies include reinstatement, back pay, compensatory damages, attorneys fees and costs.	Yes. *See Marcus v. Environmental Protection Agency*, USDOL Case No. 92-TSC-5 (1994).

Statute	Responsible Agency	Substantive Protection	Procedures and Remedies	Applicable to Federal Agencies
Surface Mining Control and Reclamation Act, 30 U.S.C. §§1201 *et seq.* §1293 contains the anti-retaliation provisions.	Secretary of Interior.	Prohibits retaliation for filing complaint or testifying in enforcement proceedings.	Administrative hearing, review in U.S. Court of Appeals. Remedies include reinstatement, back pay, and attorneys fees and costs.	No.
Surface Transportation Assistance Act of 1978, 49 U.S.C. §§31101 *et seq.* §31105 contains the anti-retaliation provisions.	Department of Labor.	Prohibits retaliation for filing a complaint or instituting any proceeding relating to violations of motor vehicle safety rules or refusing to operate unsafe vehicle.	Administrative investigation by Secretary of Labor, appeal to U.S. Court of Appeals following a hearing. Remedies include reinstatement, back pay, compensatory damages, and attorneys fees.	No.
Toxic Substances Control Act (TSCA), 15 U.S.C. §§2601 *et seq*. §2622 contains the anti-retaliation provisions.	Department of Labor.	Prohibits retaliation for commencing proceedings, or for testifying, assisting, or participating in enforcement proceedings.	Administrative hearing before ALJ, review by Secretary of Labor, appeal to U.S. Court of Appeals. Remedies include reinstatement, back pay, compensatory damages, exemplary damages, and attorneys fees.	Yes. *See Marcus v. Environmental Protection Agency*, USDOL Case No. 92-TSC-5 (1994).
Whistleblower Protection Act of 1989 (WPA). [See Civil Service Reform Act]				